

State or Country Interest as Analytical Framework for Choice of Law

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I. INTRODUCTION

I would like to express support for the use of state or country interest analysis as a useful methodological framework for choice of law. My support is prompted by three major considerations: (1) the importance of policy analysis which goes hand in hand with interest analysis; (2) the usefulness of determining the indifference or interest of a state or country in having its law applied to a transaction with which it is connected. This indicates to the forum how it can contribute to the give and take of comity and abide by constitutional constraints; and (3) the need to balance the respective interests of countries involved in regulatory processes, such as antitrust, securities regulation, reexport control, and environmental protection, in order to satisfy jurisdictional, and sometimes choice of law, requirements. I shall deal with each consideration in turn.

II. POLICY ANALYSIS

It is both a historical and jurisprudential fact, with variations from state to state, that the approach to law in the United States is policy oriented. It is also generally accepted, at least in the United States, that choice of law does not consist of the choice of a legal system, but of a choice of a rule of decision, and that it is necessary to construe or interpret the potentially applicable foreign statutory or common law provisions in order to determine the underlying policy and intended objectives. This is an application of teleological interpretation which is universally favored. It is, of course, conceded that policy analysis is not only necessary for the determination of state interest, but is also necessary for the determination of the parties' expectations and the socioeconomically better law.

III. STATE AND COUNTRY INTEREST

In the light of policy analysis, the court can determine whether the provisions which claim application are reconcilable or conflicting and, if conflicting, whether one country or state which is connected with the transaction may claim a greater interest in having its law applied. If none of the legal systems with which a transaction is connected has any socioeconomic interest in having its law applied, then the forum is free to apply its own law or the law which accords with its socioeconomic preference. Interest analysis complements the quantitative aggregation of connecting factors with an overall qualitative evaluation. Furthermore, it is constitutionally

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necessary to assess the contacts with the forum and the legitimate interest of the forum in order to determine whether due process and full faith and credit requirements have been met.¹

IV. TRANSNATIONAL REGULATION

Transnational regulation lies at the intersection between public and private international law. The problem of extraterritorial reach of United States laws raises questions of legislative, judicial, and administrative jurisdiction. When a United States statute expressly provides that it applies extraterritorially, the application of American law follows as a matter of course. However, the extraterritorial application of antitrust clearly raises a question of choice of law which is resolved by taking into account, among other factors, the respective interests of the United States and of the foreign country involved.² The determination of competing countries' interests in areas of transnational regulation provides a useful guideline to legislative and administrative activity and to dispute resolution by courts or arbitrators.³ Often, the distinction between jurisdiction and choice of law is not clear in this area of the law. It becomes apparent when acts of state or state compulsion are invoked.

V. THE CIVIL LAW APPROACH

In contrast, some civil law countries are handicapped in their conflict of laws analysis because they are stuck with rigid conflict of laws provisions in their codes. These mandate the application of a particular legal system unless excluded by the overriding consideration of forum public policy. The public policy scrutiny is exclusionary rather than a positive factor in the choice of law process. Exclusionary public policy is often parochial, whereas policy as a positive factor represents respect for foreign policy considerations.

I share with some civil lawyers the view that the approach to private international law in civil law countries will improve if the content of the potentially applicable provisions are analyzed and policy considerations are applied positively and constructively rather than negatively. In civil law countries, the prevailing judicial notice of foreign laws facilitates such a process while code restraints seriously impede it by imposing in most cases wooden choice of law rules.

VI. PREDICTABILITY OF OUTCOME

The strongest argument against interest analysis is that it offers specific formulas for specified factual situations, but it provides no general criterion for the solution of conflict in new factual situations. I respectfully disagree with this argument. The generally accepted basis of conflict of laws is a form of constructive comity in a technologically integrating world. In some cases, there is also constitutional com-

1. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) *Lauritzen v. Larsen*, 345 U.S. 571 (1952); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

2. *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 613-14 (9th Cir. 1976).

3. As to the jurisdictional aspect, see *RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 402 and 403(2)(g) (Tent. Draft No. 2, 1981).

pulsion. It is therefore of great importance to the forum to determine whether it has freedom to apply what it considers the rule of decision that satisfies party expectations and serves preferred socioeconomic goals.

In the commercial area where predictability is important, it is achieved in practice through choice of forum or arbitration clauses and the choice of law clauses.⁴ It is hoped that increasingly flexible statutory provisions will regulate specific areas of conflict of laws. This will increase predictability. In drafting such statutory provisions, state or country interest and policy preferences are bound to play an important role. Similar considerations apply to regulatory or choice of law conventions in which the balancing of interests of countries provides the only objective and rational criterion for the formulation of rules, standards, or guidelines that will be acceptable to the signatories and contribute to international order. The balancing of country or state interests, rather than being a doctrine of the past, is a doctrine of the future. In a world that integrates under the compulsion of technological progress, country or state interest analysis is bound to play an increasing role not only in the field of transnational jurisdiction, but also in the field of transnational choice of law. Cooperation in such fields as antitrust, reexport controls, judicial assistance, and environmental protection will include agreements concerning jurisdiction and the applicable law.

VII. PRODUCTS LIABILITY

Applying the above thoughts to products liability, I suggest the following tentative solutions:

Illustration (1): "M" Inc., a Michigan car manufacturer, exports cars world-wide and to all the states in the United States. A car sold successively through a West German distributor and retailer to "B" explodes in West Germany as a result of bad design and/or defect in manufacture and kills or injures "B" or "C", a passenger, or "D", an innocent bystander. Jurisdiction lies in either West Germany or Michigan. Both Michigan and West Germany have an interest. The interest of Michigan is not to impose on "M" a liability greater than that imposed on other manufacturers in West Germany. The interest of West Germany is to impose on a foreign manufacturer at least the same liability that is imposed on local manufacturers for the protection of victims. The negligence law of West Germany should apply. The law of West Germany in connection with defects (though not designs) and vicarious liability is less strict than the law of Michigan. Application of West German law satisfies the expectation (planning) of the manufacturer and the expectations of the victims. According to the generally prevailing view in the United States, strict products liability is better law than negligence. The court, however, should not be guided by better law considerations that would surpass the interest of the country and state involved and frustrate the expectation of the manufacturer or surpass the expectation of the German victims.

Illustration (2): "D", an owner-driver domiciled in New York, takes his car which is manufactured by "M" to West Germany. The car explodes in West Germany and injures "D" and "S", a passenger and German domiciliary. Action in tort by "D" and "S" against the manufacturer "M" lies in Michigan or New York. New York strict liability

4. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 INT'L TRADE J. 311-34 (1978).

applies as to "D". But what about "S"? The position of "S" is similar to the factual position of Susan Silk in *Tooker v. Lopez*,⁵ where, however, her position was not analyzed. It is arguable that German law applies in determining her rights, and this seems to accord with the suggested solution in the Hague Convention on the Law Applicable to Products Liability of 1973.⁶

Illustration (3): Conversely, if a car which is manufactured in West Germany and exported to New York kills or injures in New York because of a defect in manufacture, it exposes the German manufacturer to strict liability. New York has a strong interest in protecting all the victims in New York by applying strict liability. If the car is taken by its German domiciliary owner-driver and driven to New York and there, because of a defect in manufacture, the car either kills or injures the owner-driver, West German law should apply. New York has no interest in imposing strict liability. The expectations of the German manufacturer and of the German owner-driver are satisfied. If, however, the car injures a New York or Illinois domiciliary who is a passenger in the car or is an innocent bystander, strict liability should apply.

Illustration (4): Products liability with respect to airplanes is to be treated the same as that with respect to cars provided the plane is used within the national borders of a country or state and the injury occurs therein. On the other hand, if the plane is used in interstate or international flights, the state or country where the plane was manufactured and delivered has a stronger interest than the interest of the country or state in which the plane crashed. The connection with this latter country or state is entirely fortuitous and is not within the expectation (planning) of the manufacturer. Multiplicity of domiciles of passengers and members of the crew would render the application of the law of the domicile impractical.

The above illustrations are not intended to be exhaustive. I intend to cover elsewhere, in a comprehensive study, the interrelated areas of jurisdiction, choice of law, enforcement of judgments, and comparison of internal law as they relate to products liability.

VIII. CONCLUSION

Country or state interest analysis in combination with parties' expectations, whenever such expectations matter, provide a useful methodological framework for choice of law and for the formulation of flexible alternative provisions in choice of law statutes, in private international law conventions, and in agreements for transnational regulatory cooperation. The Convention on the Law Applicable to Contractual Obligations of the European Community⁷ commendably reflects such a flexible approach. It also reflects a country's interest in protecting the economically coerced.

5. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

6. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW COLLECTION OF CONVENTIONS 193 (1980).

7. 23 O.J. EUR. COMM. (No. L 266) 1 (1980).

Currie's Governmental Interest Analysis—Has It Become a Paper Tiger?

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It is difficult to imagine a branch of American law where scholars have exerted greater influence than in conflicts, or to imagine a more influential conflicts scholar than Brainerd Currie. This helps to explain the attention paid in this Symposium to Currie. What is puzzling is that his ideas are still capable of generating so much controversy. Except in a biographical sense, the plans Currie had for American conflicts law over twenty years ago are no longer of great importance. What is important is how, or whether, courts have responded to his ideas. The purpose of this Comment is to suggest that, contrary to what the contributions of Professors Lea Brilmayer and Friedrich Juenger¹ might indicate, there is little in Currie's governmental interest theory left to attack. The two most significant aspects of Currie's theory were: (1) appreciation of interest analysis as a choice of law technique,² and (2) the conclusion that an interested forum must always apply its own law.³ The first aspect has enjoyed such widespread acceptance in modern choice of law theory that it is hard to regard it as controversial. The second aspect, though controversial, has been greeted by such a lack of judicial acceptance that it no longer poses a concern.

Currie's writing on interest analysis was his principal contribution to the development of modern conflicts theory. He was chiefly responsible for the analytic technique of determining state interests from an examination of the substantive policies of the rules vying for acceptance. His contributions can be seen as part of a larger movement away from formalism and toward instrumentalism in procedural jurisprudence.⁴ With others,⁵ he questioned the formalism of the original Restatement of Conflicts and its blindness to the substantive content of rules.⁶ He articulated the

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1. See Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985); Juenger, *What Now?*, 46 OHIO ST. L.J. 509 (1985).

2. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

3. Currie regarded courts to be ill-suited to choose which of two interested states might possess the more deserving interest. He advocated the application of forum law whenever "the court finds the forum state has interest in the application of its policy." B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 2, at 184. Currie subsequently offered a more subdued version of his test. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 763 (1963). However, he never retreated from his position that the truly interested forum should always apply local law. Discussions of Currie's approach, more extensive than space here permits, may be found in Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS 75, 146-49 (1970), and E. SCOLES & P. HAY, *CONFLICT OF LAWS* 16-20 (1982).

4. I have attempted to trace this movement through an examination of more or less contemporaneous developments concerning equity doctrine, choice of law, *res judicata*, personal and federal subject matter jurisdiction, and the Federal Rules of Civil Procedure. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 394-96 (1983). On the instrumental dimensions of modern choice of law, see, in addition, Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063 (1979), and Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27 (1976).

5. See, e.g., Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1959).

6. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 2, at 86-87.

"true" conflict, where the substantive policies of each rule were at stake on the facts of the case.⁷ Currie's ideas of interest analysis have had widespread judicial and academic acceptance. By whatever name, all modern choice of law approaches include in their design some mechanism for probing the interests of the forum and other jurisdictions by investigating the extent to which policies accounting for substantive rules will be advanced through their application in the particular case.⁸

In contrast, Currie's approach to forum favoritism has seldom been adopted by courts. Courts have rarely been willing to dismiss the law of another apparently interested jurisdiction on the ground that, because the forum is interested, forum law must apply.⁹ Courts may have balked not so much because invariable application of the law of the interested forum is unprincipled as because the sweep of Currie's rule deprives courts of the opportunity to *sound* principled.¹⁰ Moreover, Currie's approach may not have given courts enough to work with. His methodology stressed the important concern of interest analysis to the neglect of two other concerns: problems of judicial administration and party fairness.¹¹ Currie's approach has not been able to compete with other modern approaches in the judicial marketplace. Courts unwilling to relinquish the idea of forum neutrality opt for the Second Restatement of Conflicts.¹² Courts willing to favor forum law, but wishing to sound principled while doing so, prefer Leflar's ostensibly neutral but eminently malleable choice-influencing considerations.¹³

Today, Currie's governmental interest analysis is scarcely more than a paper tiger. His view that the interest of a jurisdiction in the advancement of its substantive policies is a valid choice of law concern is accepted by most as a basic tenet of modern

7. E. SCOLES & P. HAY, *supra* note 3, at 17-18.

8. This feature has a central place in the modern choice of law methodologies which have gained greatest judicial acceptance. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966). It has also figured prominently in the work of the most influential modern commentators. See A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS—CASES AND MATERIALS ON CONFLICT OF LAWS* (1965); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (2d ed. 1980).

9. The most famous example may be *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964). *Lilienthal* is summarized in R. WEINTRAUB, *supra* note 8, at 370-71. As Professor Weintraub notes, the Oregon Supreme Court subsequently appears to have recanted in *Casey v. Manson Constr. and Eng'g Co.*, 247 Or. 274, 428 P.2d 898 (1967). *Id.* at 371.

10. Since Currie's approach required the truly interested forum to always apply its own law, see *supra* note 3, it created no need or opportunity for a court to say that the forum was the more interested of two interested jurisdictions. Yet, courts seemed to want credit for that point when they felt they could make it. It follows that they would prefer a choice of law approach which attaches legal significance to the fact that the forum is the more interested. This may explain in part the Currie methodology's lack of judicial popularity. It may also explain the California Supreme Court's marriage of Currie analysis with the essentially incompatible interest-comparing concept of "comparative impairment" in *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

11. The importance of dealing with concerns of party fairness at the level of choice of law doctrine has increased in light of the refusal of the United States Supreme Court in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) to read effective fairness protections into the due process clause of the Constitution. See Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889, 901-06 (1981); Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Ins. Co. v. Hague*, 66 MINN. L. REV. 327, 345-55 (1982).

12. The Second Restatement "is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law." Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 692 (1963).

13. See Leflar, *supra* note 8. Elsewhere, I have attempted to demonstrate that the migration of courts to Leflar's approach can be explained, at least in substantial part, by the fact that his choice-influencing considerations technique has offered a means of advancing forum interests which, if less chauvinistic in appearance than Currie's approach, is no less efficient. Shreve, *supra* note 11, at 342.

theory.¹⁴ In terms of judicial acceptance, his more controversial ideas were still-born.¹⁵ It is understandable that continental scholars like Professor Dimitrios Evrigenis¹⁶ express polite wonder over the amount of time American conflicts scholars still spend rehearsing points of governmental interest debate. This Symposium would be exceedingly valuable if it did no more than lay to rest many of the scholarly antagonisms over Currie's work. Other topics, such as the relationship between conflicts and personal jurisdiction and developments in the codification of conflicts doctrine, deserve our attention.

14. But see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981) (noting the widespread acceptance of interest analysis but questioning its underlying assumptions).

15. In contrast, true believers may still be found in the academic community. See, e.g., Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255 (1979); Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980).

16. Evrigenis, *Interest Analysis: A Continental Perspective*, 46 OHIO ST. L.J. 525 (1985).

